

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PAUL ANTHONY TUMA

Petitioner,

v.

ALICE PAYNE,

Respondent.

Case No. C05-5827RJB

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
MAY 26<sup>TH</sup>, 2006**

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. Petitioner filed this action under 28 U.S.C. § 2254.

INTRODUCTION, PROCEDURAL HISTORY, AND SUMMARY CONCLUSION

Petitioner challenges a 2002 Thurston County conviction by guilty plea for manufacturing a controlled substance, methamphetamine. (Dkt. #15, Exhibit 1). He was sentenced on July 31<sup>st</sup>, 2002 to 67 months. (Dkt. # 15, Exhibit 1). Petitioner did not file a direct appeal, however the documentation petitioner attaches to his traverse shows he did file a motion to withdraw his guilty plea on January 15<sup>th</sup>, 2003. (Dkt. # 22-2 page 2). This motion was ultimately transferred to the Washington Court of Appeals to be handled as a Personal Restraint Petition on March 13<sup>th</sup>, 2003. (Dkt. # 22 page 2).

1 The Personal Restraint Petition was denied and a certificate of finality was entered on  
 2 October 17<sup>th</sup>, 2003. (Dkt. # 15, Exhibit 4). Over one year later on December 21<sup>st</sup>, 2004 petitioner  
 3 filed a second Personal Restraint Petition which the Washington Court of Appeals held was time  
 4 barred. (Dkt. # 15, Exhibits 5 and 6). A motion for discretionary review was filed and the  
 5 Washington State Supreme Court agreed the second petition was time barred. (Dkt. # 15, Exhibits 7  
 6 and 8). A motion to modify the ruling was denied on November 30<sup>th</sup>, 2005 ending state review.  
 7 (Dkt. # 15, Exhibit 10).

8 The court has reviewed the record and agrees with the state courts that this petition is time  
 9 barred.

### 10 DISCUSSION

#### 11 One Year Limitation Period of 28 U.S.C. § 2244(d)

12 Federal habeas corpus petitions are subject to a statute of limitations under the 1996  
 13 amendments to 28 U.S.C. § 2244(d), which were signed into law April 24, 1996 as part of the  
 14 Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2244(d) provides as follows:

15 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a  
 16 person in custody pursuant to the judgment of a State court. The limitation period shall run  
 from the latest of-

17 (A) the date on which the judgment became final by conclusion of direct review or  
 18 the expiration of the time for seeking such review;

19 (B) the date on which the impediment to filing an application created by State action  
 in violation of the constitution or laws of the United States is removed, if the applicant was  
 prevented from filing by such State action;

20 (C) the date on which the factual predicate of the claim or claims presented could  
 21 have been discovered through the exercise of due diligence.

22 (2) The time during which a properly filed application for State post-conviction or other  
 23 collateral review with respect to the pertinent judgment or claim is pending shall not be  
 counted toward any period of limitation under this subsection.

24 Giving Mr. Tuma the benefit of the 30 days he had to file a direct appeal, the one year time  
 25 frame would have commenced 30 days after he was sentenced. Thus the one year time frame began  
 26 on August 30<sup>th</sup>, 2002. (Dkt. # 15, Exhibit 1). Rather than using the date Mr. Tuma's motion to  
 27 vacate his plea was transferred to the state court of appeals this court will use the earlier date of  
 28

1 January 15<sup>th</sup>, 2003 when Mr. Tuma filed his motion to withdraw the guilty plea. 138 days of the 365  
2 days expired between August 30<sup>th</sup>, 2002 and January 15<sup>th</sup>, 2003 leaving 227 days left on the one year  
3 time frame.

4 On October 17<sup>th</sup> 2003 the Washington State Court of Appeals entered the certificate of  
5 finality. (Dkt. # 15, Exhibit 4). While the petition had been dismissed earlier the court will again  
6 give petitioner the benefit of the best possible time frame. From October 17<sup>th</sup>, 2003 till May 31<sup>st</sup>,  
7 2004 the remaining 227 days of the one year statute ran without interruption. When petitioner filed  
8 his second Personal Restraint Petition on December 21<sup>st</sup>, 2004 he was 204 days past the one year  
9 statute of limitations. (Dkt. # 15, Exhibit 5).

10 Petitioner argues the statute of limitations does not matter because his Judgment and  
11 Sentence is invalid on its face. (Dkt. # 22). Petitioner proceeds to argue the merits of his action and  
12 to challenge the sufficiency of the evidence. (Dkt. # 22). The argument goes beyond the face of the  
13 Judgement and Sentence and is not convincing. The court recommends **DISMISSAL** of this  
14 petition as time barred.

#### 15 CONCLUSION

16 This petition is time barred. Accordingly, the petition should be **DISMISSED WITH**  
17 **PREJUDICE**. A proposed order accompanies this report and recommendation.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
19 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
20 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
21 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
22 72(b), the clerk is directed to set the matter for consideration on **May 26<sup>th</sup>, 2006**, as noted in the  
23 caption.

24 Dated this 4<sup>th</sup> day of May, 2006.

25 /S/ J. Kelley Arnold

26 J. Kelley Arnold

27 United States Magistrate Judge